

## Rule 3-1 STATE CONTRACTS

### 1. AUTHORITY:

Article V, Section 33, Constitution of Colorado  
Article XII, Section 13 (2), Constitution of Colorado  
Governor's Executive Order, signed October 1, 1977 - CHECK  
Governor's Executive Order, signed April 7, 1978 - CHECK  
2-2-320(2), C.R.S. (Attorney General Contract Approval)  
24-30-903(d), C.R.S. (Telecommunications Contract Approval)  
24-30-1104(1)(h), C.R.S. (Central Service Contract Approval)  
24-30-1107, C.R.S. (Central Services Contracts)  
24-30-1303(1)(a), C.R.S. (State Buildings Contract Approval)  
24-31-101, C.R.S. (Attorney General - Legal Advisor)  
24-30-202, C.R.S. (State Controller Authority)  
24-101-105 (Procurement Code)

### 2. DEFINITIONS:

Interagency Contracts - Formal legally binding agreements between two state agencies and/or institutions of higher education are state contracts as defined in this fiscal rule and shall be subject to the provisions and requirements of this fiscal rule.

Personal Service Contracts - Service or benefit purchased by the state where the state is to receive direct benefit. Individuals or firms performing these services are considered independent contractors and are not considered employees of the state.

State Contract - A formal legally binding agreement between two state agencies and/or institutions of higher education or one state agency or institution of higher education and another party or an amendment to such agreement, which ultimately results in the disbursement of funds. For the purpose of this fiscal rule, state contracts include, but are not limited to, outsource contracts, personal service contracts, purchased service contracts, and settlement agreements. State contracts, as used in this fiscal rule, do not include purchase orders.

Outsource Contracts - A formal legally binding agreement between a state agency or institution of higher education and another party or an amendment to such agreement whereby the state agency or institution of higher education remains fully responsible for the provision of affected services and maintains control over management decisions while another entity operates the function or performs the services. Outsource contracts include contracting out, granting of franchises to private firms, and the use of volunteers to deliver public services. All contracts that meet the definition of outsource contracts shall be submitted to the state controller's office for review unless specifically authorized by state statute. State contracts that divert revenues due the state are subject to state controller's review.

Contracting Out – Contracting out is the hiring of private-sector firms or nonprofit organizations to provide a good or service for the state agency or institution of higher education. Under contracting out, the state remains the financier and has management and policy control over the type and quality of services to be provided.

Granting franchises – In franchising external services to private firms, the state agency or institution of higher education grants a concession or privilege to a private-sector entity to conduct business in a particular market or geographical area, such as concession stands, hotels, and other services provided in certain state parks. The state agency or institution of higher education may regulate the service level or price, but users of the service pay the provider directly.

Purchased Service Contracts - Service or benefit purchased by the state for a third party. An example is medical services received by a third party through a state contract between a medical care provider and the Department of Health Care Policy and Financing. Individuals or firms performing these services are considered independent contractors and are not considered employees of the state.

Purchase Order - A document prepared and signed by an authorized employee of a state agency or institution of higher education for the purpose of encumbering funds and securing goods or services from a vendor. For the purpose of this fiscal rule, a purchase order is not considered a state contract.

Settlement Agreements - Formal legally binding state contracts between two or more parties for the purpose of ratifying decisions reached concerning employment or contractual disputes.

### 3. RULE:

3.1 State contract form -All state contracts, including leases, shall be prepared on standard letter size paper, 8 1/2" X 11".

3.2 State contract content – All state contracts shall include the following elements:

- a. Identification of the Parties
- b. Funding Obligation Authority
- c. Factual Recitals
- d. Scope of Work
- e. Payment Terms
- f. Performance Period
- g. General Terms and Conditions
- h. Special Provisions (except of leases and interagency agreements)
- i. Signature Page

Refer to State Controller policy for further details on these items.

3.3 Approved State Contract Forms

The State Controller may approve forms of use as state contracts. These forms include:

3.3.1 Waived Contracts – This type of form contract contains the same provisions and only the name of the contractor and amount of the contract changes. After the agency obtains approval from the State Controller for a waived contract, the agency can use the waived contract form without obtaining State Controller approval for each individual contracts.

3.3.2 Contract Modifications – These modification tools contain specific language for specific situations. The State Controller has approved the following contract modification forms:

- a. Contract Amendments
- b. Options
- c. Change Order Letters
- d. Task Orders
- e. Funding Letters

3.3.3 State leases and licenses of real property – These shall be in a form approved by the State Controller. All state leases and licenses shall contain:

- a. the State Controller's approval condition (Special Provision Number 1),
- b. the funds availability clause (Special Provision Number 2),

- c. a collocation clause, The State Controller, with the concurrence of the Executive Director of the Department of Personnel and Administration, may agree to modify or waive the collocation clause upon good cause shown.
- d. vendor offset (special provision number 7)
- e. Clauses specifying cancellation requirements where the premises are destroyed by fire and/or where the premises are subject to eminent domain.

Refer to the State Controller Policy for more details regarding the types of approved contract forms.

### 3.4 State contract provisions

- A. All state contracts, except leases and interagency agreements, shall contain the applicable Special Provisions found in Appendix A or Appendix B to this chapter of the state fiscal rules.
- B. All State contracts shall contain a maximum dollar amount to be paid by the state during each fiscal year of the contract. Those state contracts where a maximum contract amount cannot be readily determined, shall contain one of the following provisions:

"Payment pursuant to this Contract shall be made as earned, in whole or in part, from available state funds in an amount not to exceed the amount of funds available for the purchase of \_\_\_\_\_. The funds that are available may be used to pay multiple contractors for the services that are described in this contract. The liability of the state, at any time, for such payments shall be limited to the unexpended amount remaining of such funds.

Multiple fiscal year contracts shall contain the following provision:

"Payment pursuant to this contract shall be made as earned, in whole or in part, from available state funds in an amount not to exceed the amount of funds available for each fiscal year this contract is in effect for the purchase of \_\_\_\_\_. The funds that are available for each fiscal year may be used to pay multiple contractors for the services that are described in this contract. The liability of the State, at any time, for such payments shall be limited to the unexpended amount remaining of such funds."

In addition, state agencies and institutions of higher education using one of these provisions shall also request an encumbrance waiver from the State Controller.

- C. All state contracts involving federal funds shall include the following provision:  
  
"This Contract is subject to and contingent upon the continuing availability of Federal funds for the purposes hereof."
- D. All state contracts for the lease, easement, right-of-way or disposal of state property located in a flood plain to any non-state, public or private party, shall reference in the conveyance: those uses that are restricted under identified federal, state or local flood plain regulations; those appropriate restrictions to the use of properties by the grantee or purchaser and any successors, except where prohibited by law; or withhold such properties from conveyance.
- D. All state contracts shall contain a specific termination date or an event from which such date may be determined.

#### **4. STATE CONTRACT APPROVALS**

The chief executive officer, or a delegate, of a state agency or institution of higher education shall sign all state contracts on behalf of the state agency or institution of higher education.

**It shall be the responsibility of the contracting state agency or institution of higher education to obtain all required approvals. Approvals of certain state agencies and institutions of higher education are required by statute, executive order, or fiscal rule depending on the subject matter of the state contract. Proof of all required signatures indicating the approval of state agencies and institutions of higher education shall be retained by the contracting state agency or institution of higher education. State contracts requiring approvals include:**

- 4.1 Service contracts require the approval of the State Personnel Director.
- 4.2 Construction contracts and controlled maintenance contracts require the approval of the State Buildings Director, or a delegate, unless otherwise exempted by statute.
- 4.3 Real property contracts, including leases, easements, and rights of way contracts, require the approval of the Director of the Real Estate Program or a delegate, unless otherwise exempted by statute. Excluded from this requirement are those real properties administered by the State Board of Land Commissioners and the Department of Transportation.
- 4.4 Communication system contracts involving telephone, radio, microwave, tale-type, closed circuit television, automated data processing communications systems require the approval of the State Communications Coordinator, or a delegate.
- 4.5 Legal and paralegal service contracts require the approval of the Attorney General's Office.
- 4.6 Centralized service contracts require the approval of the Director of the Division of Central Services, or a delegate, for all state agencies within the counties of Adams, Arapahoe, and Jefferson and the city and county of Denver. Examples include state contracts for the acquisition of the following: motor pool operation, motor vehicle maintenance, mail or messenger services, office copying, graphic design for print media, printing and binding, microfilming, or design of management forms.
- 4.7 Debt collection service contracts require the approval of the State Controller, or a delegate.
- 4.8 State agency or institution of higher education financial systems used to record their financial transactions and financial information and to develop their financial reports and prepare their financial statements shall be approved by the State Controller, or a delegate.
- 4.9 All information technology projects with a purchase price of over \$100,000 require the approval of the Office of Information Technology.

All state contracts shall be executed by the State Controller or by an individual delegated to execute state contracts by the State Controller. If an attempt is made to execute a State Contract without the approval of the State Controller, or a delegate, the state contract shall be null and void and not binding against the state. However, every person involved in incurring the obligation shall be jointly and severally liable for the obligation.

#### **State Contract Legal Review**

All state contracts shall be reviewed by the Attorney General's office except for interagency contracts and those state contracts for which the State Controller has designated in writing an attorney,

employed by the state agency or institution of higher education and authorized by the State Attorney General, to perform the required legal review. If the state agency or institution of higher education's legal review raises a question concerning the legality of the state contract, the question shall be referred to the Attorney General's Office.

**Review by the Attorney General's Office or an attorney delegated by the State Controller shall include the following:**

- .01 Compliance with the Colorado Constitution, state statutes, regulations, and executive orders.
- .02 Authority of the contracting state agency or institution of higher education.

The Attorney General review may also include:

- .03 Risk analysis, including appropriate terms and conditions.
- .04 Conformity between the RFP or IFB and final contract, as appropriate.
- .05 Vendor compliance with all preconditions to the contract, as appropriate.

If during the course of the legal review a question should arise as to state contract language that cannot be resolved, it shall be referred to the State Controller together with a memorandum detailing the unresolved

issue for resolution. A copy of the memorandum shall also be sent to the principal contracting state agency or institution of higher education.

Outsource contracts shall be reviewed by the state Attorney General, or a delegate, but need not be signed and executed by the State Controller, or a delegate, unless the state contract requires an expenditure of state funds or the Attorney General identifies an issue concerning the expenditure or potential expenditure of state funds.

**Review and Approval by the State Controller**

Upon receipt of a state contract, the State Controller, or a delegate, shall review the state contract to ascertain whether or not the proposed expenditure is authorized by the appropriation to which it is proposed to be charged, whether or not the prices or rates are in accordance with law or administrative rules or are fair and reasonable and whether or not the amount of the expenditure exceeds the unencumbered balance.

Upon approval, the state contract shall be executed by affixing the signature of the State Controller, or a delegate.

Under certain circumstances the State Controller may delegate in writing authority to execute state contracts. Delegation of the State Controller's signature authority does not eliminate the requirement that all state contracts have a legal review or exempt any state agency or institution of higher education from securing the required state contract approvals, as provided in the state contracts approval section of this fiscal rule.

Delegation granted by the State Controller to state agencies to execute state contracts on his behalf is limited to the specific types of contracts identified in the Letter of Delegation issued to the state agency. All contract types that are not specifically identified as delegated contracts are not delegated contracts and must be executed at the State Controller's Office.

**Interagency Contracts**

Interagency contracts require approval of the State Controller, or a delegate, unless the state agency or institution of higher education disbursing the funds has been delegated State Contract signature

authority by the State Controller. Interagency contracts shall, at a minimum, include the following provisions:

- .01 Identification of parties to the state contract;
- .02 Appropriation authority, including fund, state agency or institution of higher education, appropriation code, and encumbrance number;
- .03 Scope of work;
- .04 Statement of consideration, (if applicable);
- .05 Payment and other performance; and
- .06 Definition of breach and remedies (shall be consistent with Fiscal Rule 2-6).

### **Employee/Employer or Independent Contractor**

Careful distinction shall be made between work that should be accomplished by persons who are employees of the state and work that may be accomplished by individuals or firms on a personal services contract. The responsibilities and obligations of the state differ between employee/employer arrangements and agreements with independent contractors. The state has a third party liability for the acts of its employees, whereas independent contractors are liable for their own actions. The status should be carefully considered and cases of doubt generally resolved in favor of the employee classification. An erroneous classification as an independent contractor may result in serious penalty to the state for failure to deduct applicable taxes.

#### **EXCEPTIONS TO RULE:**

Excluded from the provision of this fiscal rule are:

- .01 Contracts that do not provide for the disbursement of funds, with the exception of outsource contracts and contracts that divert revenues due the state.
- .02 State contracts for personal services exempted from the state personnel system by the Colorado Constitution and paid through an authorized state payroll system. Examples include appointees by the Governor and Lieutenant Governor and their administrative staffs, members of boards or commissions, faculty members of educational institutions, attorneys at law serving as assistant attorneys general, and employees of the Legislative and Judicial Departments of the state. These state contracts are considered to be advises of employment and, therefore, are not covered by this fiscal rule.

Each state agency or institution of higher education is responsible for assuring that all constitutional and statutory requirements have been met prior to signing a state contract.